Supreme Court, U.S.
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No. 00-24

IN THE
Supreme Court of the United States

PGA TOUR, INC.,
Petitioner,

v.

CASEY MARTIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

H. BARTOW FARR, III *
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, DC 20036
(202) 775-0184

WILLIAM J. MALEDON
ANDREW D. HURWITZ
OSBORN MALEDON, P.A.
The Phoenix Plaza
2929 North Central Avenue
Phoenix, AZ 85012
(602) 640-9000

* *Counsel of Record*

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition filed by respondent calls attention to the need for review in this case. With respect to the overall scope of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189, respondent advances the remarkably broad proposition that Title III applies without distinction to any person in any location at a place of public accommodation, regardless of whether they are patrons or workers and regardless of whether they are in work areas or areas generally open to the public. Then, with respect to the specific issue dividing the Ninth and Seventh Circuits, *compare* Pet. App. 8a-14a *with Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005-07 (7th Cir. 2000), respondent insists that the waiver of substantive competitive rules for some competitors does not itself fundamentally alter the nature of a high-level athletic competition, arguing that courts instead should decide on a case-by-case basis which competitive rules are important and which can be selectively modified for a disabled athlete without undue competitive advantage. These far-reaching positions find no

basis in the Act, and we urge this Court to grant review in order to clarify what the Act requires.

1. The initial question regarding application of Title III to this case is not whether Title III broadly protects against discrimination at places of public accommodation (it concededly does), but whether it provides a basis for the specific claim of discrimination made by respondent here: that the rules of competition at the highest-level Tour events prevent him from earning his living as a member of the Tour. Even though the same basic claim was brought, and rejected, under the provisions of the Act dealing directly with discrimination with regard to work-related terms and conditions, *see* Pet. 5-7 (discussing Title I allegations), respondent argues that the claim is nonetheless grounded in the "unambiguous language" of Title III. Brief in Opp. 1, 7, 10. Proceeding from the fact that the Tour events are conducted at golf courses, and that golf courses are generally regarded as places of public accommodation subject to Title III, respondent all but assumes the conclusion that he is thus an "individual" being denied "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation . . . ." 42 U.S.C. § 12182(a). This abbreviated analysis, however, takes no account of other important language in Title III, or the structure of the Act as a whole, both of which indicate that this particular claim falls outside the boundaries of Title III.

To begin with, although respondent evidently regards the term "individual" as all-inclusive, the most pertinent textual evidence suggests that the term, taken in context, is not intended to encompass persons (like respondent) seeking to perform work for entities (like the Tour) that own or operate places of public accommodation. Section 12182(b)(1)(A)(iv) of the Act, which deals in part with the problem of discrimination against an " 'individual or class of individuals' . . . [through] contractual, licensing, or other arrangement[s]," specifically defines the term

"[i]ndividual or class of individuals" to mean the "*clients or customers* of the covered public accommodation that enters into [a] contractual, licensing or other arrangement," *id.* (emphasis added), a description that obviously excludes persons working there. *Compare* 42 U.S.C. § 12112(b)(2) (provision in Title I protecting "qualified applicant or employee" against discrimination through "a contractual or other arrangement or relationship"). Although that definition is not controlling on the question here—by its terms, it applies directly only to subsection 12182(b)—there is no apparent reason, and certainly respondent has offered none, to think that Congress drafted subsection 12182(b) in unusually narrow terms in order to protect only a limited subset of the "individual[s]" more generally protected by Title III. Put another way, if it were so that Title III as a whole applies to persons providing goods or services at places of public accommodation, as well as to "clients or customers," it would be reasonable to expect Congress to protect *all of them* against potential discrimination by means of "contractual, licensing, or other arrangement[s]," and not limit that protection to clients and customers alone. Its failure to do so undercuts the theory that Title III broadly applies to regulate the requirements for "pursuit of a living." Pet. App. 8a.

It is also necessary to look more closely at the language describing what Title III seeks to assure: "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation." 42 U.S.C. § 12182(a). That language, on its face, gives no indication that it is concerned with either work-related terms and conditions or potential access to areas not open to the general public.[1] On the contrary, the most natural reading of the

[1] Respondent relies on *Daniel v. Paul*, 395 U.S. 298 (1969), to support the theory that public and non-public areas within a place of public accommodation are to be treated identically. The issue in *Daniel* had nothing to do with workers or work areas, however, but rather with members of the

words again seems to suggest that Congress meant to protect the clients and customers of places of public accommodation—that is, persons present as members of the general public—who (rather than workers) are more appropriately said to "enjoy[]" what the public accommodation has to offer. *See, e.g., Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (Title II does not apply to persons working at governmental facilities); *Cf.* Pet. 18 n.21 (citing cases in conflict with *Zimmerman*). For example, while individuals dining at a restaurant are presumably "enjoying" the goods or facilities of a public accommodation, it is a considerable stretch to fit that same language to persons working in the restaurant kitchen. This sensible reading of the statutory text is reinforced by the legislative history, which extensively discusses the application of Title III to patrons and other attendees at places of public accommodation, but not generally to persons working or otherwise seeking to work for the entities operating those accommodations. *See* H.R. Rep. No. 101-485, 101st Cong., 2d Sess. pt. 2, 99-129, pt. 3, 55-69 (1990) (House Report).

Respondent also fails to deal with the fact that any attempt to apply Title III across-the-board to persons working at places of public accommodation disrupts the overall structure of the Act, in particular the limitations embodied in Title I (the "Employment" title).[2] Although respondent baldly declares that

public seeking admission to a place of entertainment open to the general public. *See* 395 U.S. at 308. Furthermore, the Court in *Daniel*, in construing Title II of the Civil Rights Act, placed decisive weight on a definition of a covered public accommodation as "any establishment (A) * * * (ii) within the premises of which is physically located any [other] covered establishment, and (B) which holds itself out as serving patrons of such covered establishment." 395 U.S. at 303 (quoting 42 U.S.C. § 2000a(b)(4)). The Disabilities Act has no comparable provision.

[2] Respondent objects to this part of the argument, Br. in Opp. 9, saying that it was not made below. But petitioner has repeatedly argued, *inter alia*, that, even though golf courses are generally deemed to be places of public accommodation, Title III does not apply to the *competitions* conducted by the

"Congress extended the protections of Title III to all 'individuals' at public accommodations, regardless of Title I's potential applicability . . . ," Br. in Opp. 11, this *ipse dixit* comes without any supporting analysis. Most notably, respondent makes no attempt to explain why Congress would intentionally limit the reach of Title I to employees and to employers with at least 15 employees and then, proceeding in complete and utter silence, cut a large hole through that limitation by means of Title III. (As we have previously noted, Pet. 5-8, 13 n.17, respondent lost his Title I claim, because he is an independent contractor and not an employee of the Tour.) That unexplained revision, unlikely in and of itself, is all the more unlikely in light of the fact that the relevant Committee report took pains to say that Title III was not meant to address job-related practices. House Report, pt. 2, at 99. That report states unequivocally: "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." *Id.*[3]

Tour, *see, e.g.*, Appellant's Opening Brief, C.A. 9, at 32 and note 22, a position that the Ninth Circuit expressly rejected. *See* Pet. App. 8a (finding no difference "between use of a place of public accommodation for pleasure and use in the pursuit of a living"). The argument about which respondent complains is merely "an argument in support of [that] claim . . ., not an independent claim." *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2187 n.2 (2000). This Court has recently reiterated that " '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Id.* (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995).

[3] Respondent cites four cases applying Title III, Br. in Opp. 6, three of which concern patrons of a public accommodation. The fourth case, *Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998), which was relied on by the Ninth Circuit below (Pet. App. 6a), does partially support the extension of Title III to suits by independent contractors at places

What respondent seems unwilling to acknowledge is that Congress had well-recognized reasons for limiting the Act to certain workers—*not* including independent contractors—and to certain covered employers. While Congress inarguably intended to grant broad new protections to disabled persons, including disabled workers, it recognized that the Act, like other anti-discrimination laws, would give rise to a significant increase in litigation. *See EEOC v. AIC Security Investigations, Inc.*, 55 F.3d 1276,1281 (7th Cir. 1995). Following its common practice, *see, e.g.*, Pet. 10-11, 15 (discussing limitations in other civil rights statutes), Congress elected not to extend the Act to all workers at all businesses. The Seventh Circuit has observed, for example, that the decision to limit the definition of covered entities to employers with at least 15 employees "struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims." *EEOC v. AIC Security Investigations, Inc.*, 55 F.3d at 1281. Likewise, and for similar reasons, Congress intentionally extended the substantive protections of the Act, and the concomitant right to sue, only to workers defined as employees (or prospective employees), not to persons working, or seeking to work, as independent contractors. Against this background, it is implausible to think that Title III added back what Title I quite deliberately left out.

This Court has taken up a number of issues regarding construction and application of the Disabilities Act, *see* Pet. 10 n.13, but it has not yet addressed in detail the intended scope of Title III. We submit that this case presents an appropriate opportunity. By treating competitors "inside the ropes" as indistinguishable from members of the general public "outside the ropes," the Ninth Circuit has read more into Title III than is

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of public accommodation, albeit in the somewhat different context of doctors seeking to utilize hospital facilities. As the dissent in *Menkowitz* makes clear, however, the correctness of that decision, even on its own terms, is open to considerable doubt. *See id.* at 125-28 (Scirica, J., dissenting).

actually there. Not only does its decision erase any distinction between public and non-public spaces, it also, as respondent freely admits, throws open the Title III door to work-related claims by any person working at any place of public accommodation. *See* Br. in Opp. 9-11. Furthermore, by providing an alternative avenue for those claims, it has the corollary effect of releasing potential litigants from any obligation to comply with the procedural requirements imposed by Title I. *See* Pet. 19. This is not at all what Title III was meant to do, and further review by this Court is warranted.

2. The second question before the Court is whether Title III (if applicable) compels professional sports organizations to modify their substantive competitive rules to accommodate disabled competitors. Respondent, like the Ninth Circuit below, takes the position that the answer to this question depends upon a fact-intensive analysis in each case, weighing the relative importance of the specific rule against the "individual circumstances" of the disabled athlete. Br. in Opp. 14. But this "chancellor's-foot" approach distorts the proper statutory inquiry: to determine whether a proposed modification (waiver of a substantive rule) would "fundamentally alter the nature" of a particular good or service (the athletic competition), *see* 42 U.S.C. § 12182(b)(2)(A)(ii), the inquiry must focus primarily on the nature of the good or service. Had the Ninth Circuit (like the Seventh Circuit) given proper weight to that part of the equation, it would have recognized that the highest-level Tour competitions (the particular "good" or "service" here), like any other elite sports competition, must be able to test competitors according to a uniform set of substantive rules. That need to assess performance under uniform rules, inseparable from the very nature of elite competitive athletics, does *not* vary with the "individual circumstances" of a particular athlete.

The decisions of the Ninth and Seventh Circuits on this issue cannot be reconciled. Although respondent seeks to emphasize the factual records in the two cases, Br. in Opp. 24-27, the

conflicting opinions rest, at bottom, upon two mutually incompatible approaches to the question whether, at the highest level of competitive athletics, it is critical (and thus, under the Act, permissible) for a governing organization to hold all competitors, including disabled competitors, to the same substantive rules. The Seventh Circuit looked to whether equality of treatment was essential and, finding that it was, *see Olinger*, 205 F.3d at 1006 (stating that evidence "supports the golf community's insistence that all players play all tournaments under the same conditions and rules"), it rejected the idea that it should nevertheless examine the "personal circumstances" (205 F.3d at 1005) of the particular disabled athlete, on a case-by-case basis, to decide whether he ought to be allowed to compete without full compliance. The Ninth Circuit took just the opposite tack. Paying no heed to the necessity for uniform substantive rules, it held that it was appropriate, in each case, to make an "individual determination" whether the disabled athlete, if granted a waiver, would gain a competitive advantage. Pet. App. 11a-15a. Asking a very different question, the Ninth Circuit, not surprisingly, reached a very different answer.[4]

Respondent challenges (Br. in Opp. 22-23) the need for standardized rules, saying that the view adopted by the Seventh Circuit would allow professional sports organizations, merely by making up arbitrary rules, to exempt themselves from the Act. But that assertion is incorrect. The Seventh Circuit did not just accept that uniform adherence to the "walking rule" was necessary without more. Rather, it examined the record both to determine that the rule was not a pretext for discrimination and

[4] It is worth noting that, in the course of making this "individual determination," the courts below did not conclude that the fatigue occasioned by four days of walking has *no* effect on Tour competitions. *See* Pet. App. 10a (quoting district-court finding). To the contrary, the relevant finding ("cannot be deemed significant under normal circumstances") necessarily acknowledges that fatigue is significant under some circumstances and that it may always have at least some effect.

to assure that the rule (and thus a waiver of the rule) could actually affect performance in the competition. At the same time, however, the Seventh Circuit properly took account (as the Ninth Circuit did not) that professional sports organizations have a greater need for uniformity in the application of their rules and regulations than entities that do not, by their very nature, seek precisely to measure and reward differences in physical performance.[5] It is just that sort of situation—where the need for consistent application of certain policies or practices is overriding—that the "fundamentally alter" language is meant to allow for. *See* Pet. 23-24.

Respondent asserts, however, that the Tour does not really need to apply the "walking rule" uniformly, offering as proof the fact that it sponsors certain tournaments in which players can either walk or use golf carts. Br. in Opp. 16-19. But respondent is mixing up two points. To be clear: there are no Tour-sponsored tournaments at which different players are allowed to play by different substantive rules. What respondent refers to are simply events where the Tour does not employ the "walking rule" and where each golfer, not being bound by any rule on the subject, thus may choose how to get around the course. All that demonstrates, of course, is that golf tournaments can be played without a walking requirement, a fact that the Tour readily acknowledges. That has no bearing on the issue here. The

[5] We thus agree with respondent that "individual determination[s]" may be appropriate even at this stage of the inquiry—as, of course, they are in deciding the earlier question whether a particular modification is reasonable—depending upon the nature of the good or service in question. *See* Br. in Opp. 25-27; *see also Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). In *Washington*, for example, the court of appeals noted that the association had already provided for selective waivers of its eligibility rule, thus demonstrating that uniform application of the rule was *not* necessary to preserve the essential nature of high school competition. In those circumstances, there was no evident reason not to make the same accommodation for qualified disabled athletes.

highest-level Tour events (the "good" or "service" that respondent is suing about) are very different: like every other comparable tournament throughout the world, those tournaments invariably require, and have always required, that all golfers walk the golf course at all times. *See* Pet. App. 31a (opinion of the district court) ("[n]o waiver [of the "walking rule"] has ever been granted for individualized circumstances (such as disability)").

Finally, although respondent tries to belittle the importance of this case, Br. in Opp. 28-30, he appears to accept that the decision below is, in fact, without precedent. Until now no court had ever ordered a professional sport to let some athletes, disabled or not, compete under a less demanding set of substantive rules. This novel mandate is made all the more striking, of course, by the contrary decision of the Seventh Circuit, handed down the very next day, rejecting an identical request. Furthermore, the issue having been joined, it is unlikely to go away: given the high public profile of the cases, it is reasonable to expect that additional requests for waivers, in golf and in other sports as well, will follow. *See Jones v. United States Golf Ass'n*, No. A-00-CA-278 JN (W.D. Tex., June 15, 2000) (successfully challenging enforcement of the "walking rule" by the USGA). In any event, it remains the fact that two federal courts of appeals have rendered conflicting decisions on an important question regarding application of the Americans with Disabilities Act, a question for which there should be a single answer. We ask this Court to provide that answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

H. BARTOW FARR, III *
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, N.W.
Suite 1000
Washington, DC 20036
(202) 775-0184

WILLIAM J. MALEDON
ANDREW D. HURWITZ
OSBORN MALEDON P.A.
The Phoenix Plaza
2929 North Central Avenue
Phoenix, AZ 85012
(602) 640-9000
** Counsel of Record*